United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1377

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ANGELO, SEIJO, Appellant.	Docket No. 75-1377

BRIEF FOR APPELLANT ANGELO SEIJO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
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Questions Presented

1. Whether the Government was collaterally estopped from relitigating the issue of whether appellant Seijo had possessed the package of heroin found under the seat of the Government car.

2. Whether the district court, in sentencing Seijo to fifteen years' imprisonment and three years' special probation, acted in violation of sentencing standards established by this count and in abuse of it sentencing discretion.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles L. Brient, Jr.) rendered October 24, 1975, after a jury trial, convicting appellant Seijo of conspiracy to possess with intent to distribute and distribution of a Schedule I narcotic drug controlled substance (Count I) and possession with intent to distribute and distribution of 259.5 grams of heroin on June 5, 1975, (Count IV) in violation of Sections 812, 841(a)(1), 841(b)(1)(A) of Title 21, United States Code and Section 2 of Title 18, United States Code. Appellant Seijo was sentenced to fifteen years imprisonment and three years special parole on each of Counts I and IV, sentences to run concurrently.

The Legal Aid Society was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

On June 14, 1974, appellant Angelo Seijo was named in four of six counts of an indictment charging that he and three other persons - Leonard Torres, Nicholas Hildebrandt, and James DiDomenico - had committed various violations of federal law. The charges against appellant Seijo included conspiracy to possess and distribute a narcotic drug (Count I),

possession and distribution of 259.5 grams of heroin on June 5, 1974 (Count IV), possession with intent to distribute 34 grams of heroin on June 5, 1974, (Count V), and carrying a firearm during the commission of a felony (Count VI). Prior to the first trial, the firearms count (Count VI) was severed. Appellant Seijo was then convicted on the conspiracy charge (Count I) and the charge involving the 259.5 grams of heroin (Count IV). The jury acquitted him, however, of the charge of possession with intent to distribute 34 grams of heroin (Count V).

On April 23, 1975, this Court reversed appellant's conviction and remanded the case for retrial on the ground that the Government had violated due process by failing to turn over to the defense Brady material relating to a prior felony conviction of Leonard Torres, the principal prosecution witness and his perjury as to that conviction prior to and during the first trial. United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975).*

B. The Re-trial.

Appellant Seijo was the sole defendant at the retrial, which was limited to Counts I and IV of the indictment.**

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* The decision of the Court of Appeals is set forth in appellant's separate appendix as "D".

** A copy of the redacted indictment used at the retrial is set forth in appellant's separate appendix as "B".

1. The law enforcement agents' testimony as to the transactions.

New York City police detective Scamardella testified to various transactions he had with Leonard Torres and James DeDomenico from April to June, 1974. Scamardella, posing as a drug purchaser, was introduced to Torres and DiDomenico on April 10, 1974 by a confidential police informant, Tommy Foran (42).* Torres and DiDomenico advised Scamardello that they could obtain 1/2 ounce of heroin from their supplier. Scamardello agreed to purchase this amount, and, pursuant to this agreement, the transaction took place the following day, April 11, 1974 (43-44). At that time, Scamardello asked Torres and DiDomenico if future purchases would be possible. They responded that there would be no problem in getting more (44-45).

On April 17, 1974, Scamardello telephoned Torres and arranged to purchase 1/8th kilogram of heroin (49-50).** Pursuant to this conversation, Scamardello met Torres the following day and purchased the requested drugs for $4,900 (52). At that time, they discussed the possibility of future purchases (52).***

On April 23 and 24 and May 16, 1974, Scamardella telephoned Torres several times in an effort to arrange to purchase 1 1/2 kilogram of heroin. Torres advised him, however,

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* Numerals in parentheses refer to pages of the trial transcript.

** A tape of this phone conversation was introduced and played to the jury (49-50).

*** A tape of this conversation, which took place in Scarmardello's car, was introduced and played to the jury (53).

that his supplier would not transfer so large an amount in one transaction. When Torres suggested several transactions for smaller amounts, Scamardello refused, and the transaction never took place (54-55).

During the course of these conversations, Torres referred once to his supplier as "Nick" (presumably Nicholas Hildebrandt) and on one occasion referred to the people he was working for as "these people" saying that he was being pressured to pay them. He also stated, however, that his man trusted him.*

Scamardello subsequently telephoned Torres on June 3, 4, and 5 to arrange to purchase 2/8ths of a kilogram of heroin (57, 65).**

As a result of these conversations, Scamardello met Torres at a Howard Johnson's restaurant on Fordham Road in the Bronx on June 5, 1974, at 8 p.m. (68). There, Torres advised Scamardello that Torres would have to call his supplier before picking up the drugs (69). After that call was made, Scamardello stated that he could not go with Torres, but instead wanted Torres to pick up the drugs and return with them to the Howard Johnson's parking lot (70). Torres agreed, but said that he would probably return with someone else, because

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* Tapes of the conversations on April 24 and May 16 were introduced and played to the jury (54-7, 64).

** Tapes of the June 4 and 5 conversations were introduced and played to the jury (57, 65).

his connection would want it that way (71). After Scamardello showed Torres the money in the trunk of his car, Torres left (71). He returned later with a brown paper bag and got into Scamardello's car (72). After Scamardello examined the contents of the bag, he got out of the car and removed the briefcase containing the money from the trunk. At the same time, he gave a pre-arranged signal to the surveillance agents in the area, indicating that the transaction had been completed (72). These agents then approached the car and arrested Torres (72).

Agents conducting surveillance of the June 5th transaction testified that when Torres returned to the Howard Johnson's parking lot with the drugs, he stopped the yellow Toyota he was driving outside the entrance to the lot (181). A Chevrolet, driven by appellant Seijo and containing one other passenger, Nicholas Hildebrandt, pulled up behind him (181). After Torres walked back and spoke to the occupants of the Chevrolet, he returned to the Toyota, removed a package from its seat, and proceeded into the Howard Johnson's parking lot on foot (182-3). Appellant Seijo then got out of the Chevrolet, entered the Toyota, and drove it into the parking lot, parking it at some distance from Scamardello's car (183). At the time of Torres' arrest, surveillance agents also arrested appellant Seijo, still in the Toyota, and Hildebrandt, who had remained in the Chevrolet. According to one officer, appellant Seijo, upon his arrest, stated that he was waiting for his girlfriend (207).

2. Torres' testimony

The only direct evidence indicating that appellant Seijo had knowledge of the drug transactions between Torres and Scamardello came from the testimony of Torres himself. Torres, originally a co-defendant charged in four counts of the indictment in this case, was permitted to plead guilty to one count in return for his cooperation with the Government and his testimony against the other defendants (118-130). Torres admitted that his cooperation and testimony for the Government had enabled him to reduce his liability from 60 years incarceration and a $100,000 fine (on four counts) to 15 years incarceration and a $25,000 fine (on one count) (123). He further admitted that after his testimony for the Government at appellant Seijo's first trial, his cooperation was brought to the attention of the sentencing judge, and he was sentenced to a probationary term (127-30). He further admitted that over the past five years, he had used and/or been addicted to a variety of drugs, including marijuana, opium and heroin (81-3). He testified that he was unemployed and being treated with methadone for his heroin addiction during the period when he was selling heroin to Scamardello (81, 84). He also admitted that he had denied a prior felony conviction for marijuana in his testimony at the first trial in this case and in his conversations with the Assistant United States Attorney prior to that trial, allegedly because his probation officer had once advised him that he would not have to admit to that conviction (113-14).

Torres corroborated Scamardello's description of their negotiations and transactions, adding that he had obtained the drugs involved in the transactions from Nicholas Hildebrandt (86-112). Torres testified that Hildebrandt had paid him for his role in the April 18th transaction with one ounce of heroin (97-8). Shortly thereafter, Torres attempted to sell that ounce, together with two additional ounces he obtained from Hildebrandt, to the Government's confidential informant Tommy Frano.* Frano, however, disappeared after receiving the drugs without paying for them (99). When Torres informed Hildebrandt of Frano's disappearance, Hildebrandt stated that Torres would have to pay Hildebrandt for the two ounces he had provided. Torres insisted that he had no money with which to make such a payment (99).

A few days later, Hildebrandt phoned Torres and told him to come to the Neckles Beach Bar (99). According to Torres, when he arrived there, he found Hildebrandt waiting with appellant Seijo (100). Hildebrandt allegedly informed Torres that Torres would be dealing with appellant Seijo from that point on (101). Appellant Seijo then allegedly advised Torres that he was the person financially backing Hildebrandt, and he wanted the money which Torres owed to Hildebrandt (101). According to Torres, Seijo also threatened him, saying that if Torres didn't pay, he would kill Torres, his wife and family (102).

* This was the informant that Scamardello identified in his testimony as Tommy "Foran."

Torres said that he had no money at that time, but gave them one of his cars, a 1965 Chevrolet, as partial re-payment.

When Scamardello subsequently called Torres, asking to purchase 1 1/2 kilograms of heroin, Torres returned to the Neckles Beach Bar and discussed the possibility of such a transaction with Hildebrandt. According to Torres, appellant Seijo was present during this conversation, but did not participate in it (102-3).

After that transaction failed to materialize, Scamardello phoned Torres, asking to purchase 2/8ths of a kilogram of heroin (103-4). Torres again met Hildebrandt and appellant Seijo at the Bar, where they both allegedly agreed to transact in that amount (105-6). After Torres arranged to meet Scamardello on June 5th, he returned to the bar, where Hildebrandt and appellant Seijo allegedly agreed to provide the drugs on that date(106-7).

Torres testified that when he first went to meet with Scamardello at the Howard Johnson's at 7 p.m. on June 5, he took with him two friends, Pooch and John. Torres told them only that he was going "to do something" there and might need their help. He did not tell them that he was going there to effect a drug transaction (144-5).

When Torres met with Scamardello at the Howard Johnson's, he proceeded to phone Hildebrandt at Hildebrandt's shop. Hildebrandt instructed him to bring Scamardello to

the Neckles Beach Bar, where the transaction would take place (108). When Scamardello insisted instead that the drugs be brought to the Howard Johnson's parking lot, Torres proceeded alone to the Bar. When Hildebrandt failed to show up there, Torres again phoned him at his shop (109). At Hildebrandt's instruction, Torres proceeded to the shop, where he allegedly met Hildebrandt and appellant Seijo (109).

According to Torres, after Hildebrandt handed Torres a package, appellant Seijo instructed him to drive his Toyota to the entrance of the Howard Johnson's with Hildebrandt and Seijo following in the Chevrolet (110). There, Torres was to proceed into the parking lot on foot, with Seijo following him in the Toyota (110).

When Torres arrived at the entrance to Howard Johnson's he got out of his car and walked back to the Chevrolet stopped behind him. Appellant Seijo told him that he (Seijo) would drive Torres's Toyota into the lot behind him (111). Torres then proceeded into the parking lot with the drugs, where he was subsequently arrested during the transaction in Scamardello's car (112).

3. The Defense

Appellant Seijo testified in his own defense. He has never been convicted of any crime or even arrested prior to his arrest in this case (228). He testified that he knew Hildebrandt, who was Seijo's wife's cousin's husband, but

that he had not known that Hildebrandt was a trafficker in narcotics (235, 252). On June 5th, Seijo went to the boatyard near the Neckles Beach Bar to work on a rowboat he had bought for his son. While there, he ran into Charles Albrecht, who was there to work on a boat belonging to Hildebrandt. They decided to help each other (233-4). The two men worked on Hildebrandt's boat for several hours, while drinking several cans of beer apiece (236). About mid-afternoon, Hildebrandt arrived at the boatyard to aid in the work (236). After finishing the work on the boats, the men returned to the Bar to talk, drink, and watch television (237-8). Around 8 o'clock, Torres, whom Seijo knew from having seen him in the Bar on several earlier occasions, came into the bar (237-8). While Seijo sat at one end of the Bar playing a "penny" game with some of the other patrons, he saw Torres and Hildebrandt conversing at the other end of the Bar, but was too far away to hear what they were saying (237-8). Torres then left, and Hildebrandt walked over to Seijo, telling him that Torres had said he would pay each of them $25.00 if they would go with him, presumably for protection, while he collected some money someone owed him (240).

Seijo said that he would rather go home, but Hildebrandt insisted that they could go with Torres first, and then Hildebrandt would drive Seijo home (240-41). Seijo agreed, but insisted that he be allowed to drive Hildebrandt's car,

because Hildebrandt had been drinking too much (242). They also gave Albrecht a ride, dropping him off at the Pelham Parkway (241). They then drove to a bar near Hildebrandt's store. While Hildebrandt went into the bar, Seijo drove down the street to find a parking place (243). After some time, Hildebrandt and Torres emerged from the bar, Hildebrandt returning to the car where Seijo was waiting, and Torres entering his own car (243-4). Hildebrandt and Seijo then followed Torres to the vicinity of the Howard Johnson's parking lot, where Torres asked Seijo to drive his car into the lot while Torres went to meet the individual who was supposed to pay him the money (245-6). Seijo complied, parking the car in the lot, and waiting there (246-7). He observed Torres enter a car in the lot in which another man was waiting (247). At that point, Seijo was arrested (248-9).

Seijo insisted that he had never threatened Torres, or financed any drug transactions by Hildebrandt, or told Torres that he had done such financing (239). Indeed, when Seijo was arrested, he had only $1.56 on him. He also testified that he had no knowledge that Torres was engaged in a drug transaction when he accompanied Torres to the Howard Johnson's on June 5th (252).

4. <u>The evidence going to appellant Seijo's alleged possession of 34 grams of heroin at the time of his arrest</u>.

At the first trial in this case, appellant Seijo was charged, in addition to aiding and abetting the June 5th

transaction (Count IV) and conspiring to possess and distribute heroin (Count I), with possession with intent to distribute 34 grams of heroin (Count V). This charge was based on the testimony of the arresting officers that a package of heroin was found underneath the seat of the Government car in which Torres and Seijo were seated following their arrest (FT - 119),* and Torres' testimony that he had seen Seijo place such a package in his pants as they were leaving Hildebrandt's shop earlier in the evening (FT - 240-1).

In defending himself against this charge at the first trial, appellant Seijo introduced evidence and argued to the jury that he had never possessed the drugs in question. Pursuant to this defense, appellant Seijo testified that he had never possessed that package of drugs (FT - 298). Additionally, he introduced the testimony of a former police officer to the effect that if such a package had been hidden in appellant Seijo's pants at the time of his arrest, it would have been discovered during the frisk conducted by the arresting officers before appellant was placed in the Government car (267-74). Based on this testimony, appellant's counsel then argued to the jury in summation that the package must have been hidden beneath the car seat by Torres, who was seated next to appellant Seijo in the Government car, and who had just completed a heroin transaction. Torres had testified that he had been paid in heroin for his role in previous transactions

* Numerals preceded by FT refer to pages of the transcript of the first trial.

(FT - 92-3). Counsel argued that the heroin found under the seat of the Government car had been received by Torres as a similar payment for the drug transaction he had just completed, and that it was Torres, not Seijo who had attempted to hide those drugs under the seat. (FT - 343-44). Counsel made no argument whatsoever as to the "intent to distribute" element of the crime. To the contrary, appellant Seijo testified, and the government did not contest, that he had never used or been addicted to heroin or any other drug. (FT - 282). Moreover, no evidence was introduced by either side which would indicate that the amount of drugs involved in Count V might constitute an amount that one might possess for one's own use rather than for purposes of distribution. The jury acquitted on Count V.

Prior to the commencement of the second trial, the Government announced its intention again to introduce evidence and argue to the jury that appellant Seijo had possessed that package of drugs. Defense counsel objected on the

ground that appellant's acquittal on Count V at the first trial estopped the Government from relitigating the issue of his possession of those drugs at the second trial. In support of its claim of collateral estoppel, the defense pointed out that although Count V had charged appellant with possession with intent to distribute the 34 grams, the only issue contested at the first trial was whether appellant Seijo had possessed those drugs. Consequently, the jury's acquittal could only have been based on a finding of reasonable doubt on the element of possession (9, 16). Furthermore, the possession issue which the Government intended to relitigate at the second trial was a lesser included offense of the crime charged in Count V (14). Consequently, Seijo's acquittal on Count V estopped the Government from relitigating the issue of possession at the second trial.

The trial court overruled the defense objection and ruled the evidence admissible (9, 21). The court stated that it was so holding because it believed evidence was introduced at the first trial as to what would constitute a "user's amount" (as opposed to an amount which would indicate an intent to distribute) and that therefore the jury might have rendered their acquittal on Count V on the basis of a finding that appellant Seijo had possessed the 34 grams of heroin but had not intended to distribute them (9). Defense counsel took exception to his ruling, arguing that the only defense as to that count at the first trial had been that appellant Seijo had not possessed the drugs in question (9).

Defense counsel then requested that he be permitted to advise the jury that appellant Seijo had previously been acquitted of the charge of possession with intent to distribute the 34 grams of heroin (11). The trial court denied this application, stating that if the jury were advised of the acquittal, they would also have to be advised of the prior convictions on the counts being retried (11).

The Government then proceeded to introduce evidence at trial in a second attempt to establish that appellant Seijo had possessed the heroin found under the seat of the Government car. It elicited from Torres the testimony that he had seen appellant Seijo place such a package in the front part of his pants as they were leaving Hildebrandt's shop on the evening of June 5th. Police officer Newton testified that when Torres and appellant Seijo were seated handcuffed in the back seat of the Government car following their arrest, he had observed appellant Seijo "moving his hands" (196). Appellant explained to him that he was moving his hands because the handcuffs were cutting his wrists (197). The officers then removed Torres and appellant Seijo from the car and removed the seat, discovering beneath it the package of heroin (197-8). A chemist's report admitted into evidence established that that heroin was 16.9 percent pure, approximately the same purety as the heroin which Torres had sold to Scamardello in their various transactions (221). It was diluted with lactose, the same dilutant as the Torres-Scamardello drugs. The report indicated

that past tests with other heroin samples had established that this particular dilutant is used only seven percent of the time (222).

Appellant Seijo countered this evidence by again testifying that he had never possessed the package of drugs found under the seat of the Government car (251). He also again introduced the testimony of the former police officer that if such a package had been secreted in appellant Seijo's pants at the time of the frisk following his arrest, it would almost certainly have been discovered (301). The Government countered this latter testimony with the testimony of police officer Drucker that it would have been possible to overlook such a package during a frisk (314).

The Government, in summation, described its claim that appellant Seijo had possessed this package of drugs as "the key to the case" (371), and repeatedly argued its significance to the jury at length:

> . . . Now, the defense in order to support the theory that Government Exhibit 4 did not come from Mr. Seijo put on an expert witness, Mr. Radano, to tell you about what the practice of the Police Department was. Unfortunately he hadn't been a member of the Police Department for eight years, he never participated in a narcotics case and in fact he had never been promoted after 20 years above police officer and in fact his sole job was to execute warrants, arrange undertaking because there is no criminal activity going on at the time the person is arrested. So it is quite obvious that Radano simply follows different procedures and Detective Drucker came in and he told you what the true, current, today's procedures are, and that is that the man was not searched. Again it is a matter of who you believe. Do you believe Sergeant Flynn

on this point or do you believe Angelo Seijo? Then Seijo is placed in the back seat of the car. Again Sergeant Flynn testifies that Seijo was placed in the car first and that Torres was placed in the car after him. Seijo again trying to establish that Government Exhibit 4 came from Torres says no, that's not the way it happened. Once again it is for you to determine who is being truthful here, whether it is Mr. Seijo or whether it is Sergeant Flynn. . . . Then Sergeant Flynn and Police Officer Newton see Seijo moving around. They see him moving his hands up and down with the handcuffs on as if he is trying to dispose of something from behind his back, something that may be secreted anywhere in the waistband of his pants. Now, you did hear Torres say that he originally put the heroin package in the front of his pants. Obviously during the course of the ride to the Howard Johson's Seijo put the heroin in the back where he was able to remove it and shove it under his seat. You recall there was evidence from Sergeant Flynn that the area under the seat had been checked hours before, that in the interim no one had been in that seat and Drucker told you that was standard operating procedure, to search under the seat before each case.

Then you heard the way the seat was removed and Government Exhibit 4 was found there. I don't know how well you recall the chemist's stipulation, but we stipulated that if the chemist testified he would testify that the cutting agent in this exhibit, Government Exhibit 4, was the same as that in Government's Exhibit 1 -- that was the narcotics way back on april 11th -- and Government Exhibit 3, which contained two packages. All that heroin had the same cutting agent and that was lactose and if you recall that was relatively rare. It only occurred in about 7 percent of the cases. So although the chemist couldn't say that these two exhibits, 3 and 4, came from precisely the same source, there is a very strong inference that they did. The cutting agent is the same and it is an unlikely cutting agent and of course that establishes that this packet which obviously came from Mr. Seijo, that Seijo know what was going on and that he was a participant with these fellows in the distribution of these narcotics.

(333-335)

. . . You heard that he [Seijo] said that Sergeant Flynn asked him to remove the contents of his pockets before placing him in the back seat of the car. Why did Mr. Seijo say that? Because once again he was trying to establish that he did not have Government Exhibit 4 on his person at the time that he was arrested. You heard Sergeant Flynn testify that he did not search the pockets, he did not ask him to empty them. Again a clear conflict between Sergeant Flynn and the defendant Seijo. You also heard Detective Drucker who is familiar with current police practice testify that it is absolutely not current practice to ask someone at the time of a narcotics arrest to empty their pockets. You also heard the statements about who was put into the back of the Toyota first, was it Mr. Torres or Mr. Seijo and Mr. Seijo says that Torres was there behind him. Why is that? Because he thinks that supports his claim that Government Exhibit 4 came from Torres and not from him and yet you heard Sergeant Flynn testify that Torres was not put into the car until after Seijo was hhere. What else is there? You heard Mr. Seijo testify on the stand this morning that the description that Police Officer Newton gave about the way he was moving his hands up and down, he said that that was not true and again it is up to you to decide who it is that's telling the truth, Police Officer Newton or is it Angelo Seijo. Before I sit down I simply want to ask you one question and I think if you can answer that question it is the key to the case, and that is where did Government's Exhibit 4 come from. You heard where it was seized from, you heard that the vehicle had been searched prior to that evening or that evening and that the only people in the back seat of that car were Torres and Seijo. Now, Torres could not have placed it underneath Seijo's seat. His hands were handcuffed behind his back. There is absolutely no way he could have taken this package and moved it over to the entire other side of the seat, so it could only have come from two places. It could have come from Mr. Seijo in the manner that the witnesses today, Sergeant Flynn and Police Officer Newton testified, or you would have to believe that they planted it there for

> some purpose and I think you can see that is not a credible possibility; that is not a credible theory. Why? Because if Sergeant Flynn wanaed [sic] to frame Angelo Seijo, if Police Officer Newton did it would have been a very simple matter for them to say that they found this exhibit on him. The very story itself makes it clear that both Police Officer Newton and Sergeant Flynn were telling the truth. They told you what they found. If they wanted to lay it on Angelo Seijo it would have been easy enough to say that they found it on him, but that would not have been the truth. I think you know it for another reason, that someone like Sergeant Flynn has been on the police force for 18 years and someone like Police Officer Newton has been on the force for seven or eight years, they don't come in here and commit perjury in order to convict innocent people. They don't come in here and commit perjury and put everything they have at stake on the line. One thing is clear. Someone has come in here and committed perjury. That's what Mr. Lipson says and I agree. Either you believe Flynn and the other officers or you believe this defendant and by your verdict you must make that choice.
>
> (370-72)
> **(emphasis added)**

The Court subsequently charged the jury that if it found that appellant Seijo had possessed the heroin found under the seat, they could consider that as evidence of his membership in the charged conspiracy with knowlege of its unlawful purpose (394).

C. The Verdict and Sentence

Following deliberations, the jury rendered a verdict of guilty on both counts on the indictment.

At sentencing, the Court referred to the fifteen year sentence imposed following the first trial (430-31). Although insisting that it had considered the question of sen-

tence de novo, the Court reimposed the same sentence (431).

I

THE GOVERNMENT WAS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF WHETHER APPELLANT SEIJO HAD POSSESSED THE PACKAGE OF HEROIN FOUND UNDER THE SEAT OF THE GOVERNMENT CAR.

At the first trial in this case, appellant Seijo was charged, in addition with aiding and abetting the June 5th transaction (Count IV) and conspiring to possess and distribute heroin (Count I), with possession with intent to distribute 34 grams of heroin (Count V). This charge was based on the testimony of the arresting officers that a package of heroin was found underneath the seat of the Government car in which Torres and Seijo were seated following their arrest and Torres' testimony that he had seen appellant Seijo place such a package in his pants as they were leaving Hildebrandt's shop earlier in the evening. After hearing the evidence presented by the Government and the defense on this issue, the jury acquitted appellant Seijo on Count V.

Prior to the commencement of the second trial, the Government announced its intention again to introduce evidence and to argue to the jury that appellant Seijo had possessed the package of drugs (hereinafter referred to as Government Exhibit 4) which had been the subject of Count V.

Defense counsel objected on the ground that appellant Seijo's acquittal on Count V at the first trial estopped the Government from relitigating the issue of his possession of those drugs at the second trial. In support of this objection, defense counsel argued that although Count V had charged appellant with possession with intent to distribute those drugs, the record of the first trial established that the jury's acquittal could only have been based on a finding of reasonable doubt as to the issue of possession. Moreover, possession was by itself a lesser included offense of the crime charged in Count V. For both of these reasons, the defense argued, the Government was collaterally estopped from relitigating the issue of possession at the second trial.

The district court overruled defense counsel's objection stating that evidence was introduced at the first trial as to the amount of drugs one might possess for one's own use, and that the jury might therefore have based its verdict of acquittal on a finding that appellant Seijo had possessed the drugs without the requisite intent to distribute them.

Defense counsel then requested that he be permitted to advise the jury that appellant Seijo had previously been acquitted of the charge of possession with intent to distribute Government's Exhibit 4. The trial judge also denied this application, stating that if the jury were advised of

that acquittal, they would also have to be advised of appellant's conviction on the other counts of the indictment.

A. The Government was collaterally estopped from relitigating the issue of possession since the jury's acquittal on Count V could only have been based on a finding of reasonable doubt as to whether appellant Seijo had ever possessed those drugs.

Collateral estoppel is an element of constitutional double jeopardy protection applicable to criminal proceedings. Turner v. Arkansas, 407 U.S. 366 (1972); Ashe v. Swenson, 397 U.S. 436 (1970). It acts to preclude the Government from relitigating a question which was placed in issue and decided in a defendant's favor in a prior criminal proceeding. Turner v. Arkansas, supra; Ashe v. Swenson, supra; United States v. Williams, 341 U.S. 58 (1951). Moreover, the fact that a jury renders a general verdict of not guilty to a charge involving more than one issue of fact does not prevent that defendant from arguing that the Government is collaterally estopped from relitigating one issue relating to that crime in a subsequent proceeding. Rather, when such a challenge is raised, the reviewing court is required to examine the record of the first proceeding to determine whether the jury's verdict was based on a finding of reasonable doubt as to that issue. Ashe v. Swenson, supra, 397 U.S. at 444; United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). If so, the Government

is collaterally estopped from relitigating that issue at the second proceeding.

The record of the first trial in the present case clearly establishes that the jury's acquittal on Count V, charging possession with intent to distribute the heroin in Government's exhibit 4, could only have been based on a finding of reasonable doubt as to whether appellant Seijo had ever possessed that heroin. Appellant Seijo had testified at the first trial that he had never used heroin, and this was never disputed by the government.

Moreover, no evidence was introduced by either side which would have permitted the jury to conclude that the amount of drugs involved was such that it might have been possessed for one's own use rather than for distribution. Thus, there was no issue in this case as to intent. There was no evidence on which the jury could find that appellant had possessed the drugs, but had do so for his own use. If the jury had found that he possessed the drugs at all, it could only have been for the purpose of distribution.

Since the record shows that no evidence as to what would constitute a "user's amount" had been introduced at the first trial, the finding of the district court that such evidence had been introduced and that the jury's verdict of acquittal could have been based on such evidence, rather than on the issue of possession, was therefore error.

Rather than denying the requisite intent, appellant Seijo's sole defense to Count V was his claim that he never possessed those drugs. Pursuant to this defense, appellant testified that he had never possessed Government's exhibit 4. Additionally, he introduced the testimony of a former police officer to the effect

that if such a package had been hidden in appellant Seijo's pants at the time of his arrest, as the Government claimed, it would have been discovered during the frisk conducted by the arresting officers before appellant was placed in the Government car.

In summation, defense counsel, citing this testimony, argued to the jury that Government's Exhibit 4 had never been in appellant Seijo's possession, but rather must have been hidden beneath the car seat by Torres who was seated next to appellant Seijo in the car and who had just completed a transaction in the same type of drug. Pointing to Torres' testimony that he had been paid with heroin for his role in previous drug transactions, defense counsel argued that Government Exhibit 4 had been received by Torres as payment for his role in the June 5th transaction; that Torres, not Seijo had had that package in his possession when he was arrested; and that Torres, not Seijo, had attempted to hide that package beneath the car seat. Torres' testimony that he had seen appellant Seijo hide a similar package in his pants earlier in the evening was depicted by defense counsel as a lie to hide Torres' own culpability for possession of that package.

On the basis of this record, and particularly appellant Seijo's own testimony that he had never used heroin, no reasonable jury could have concluded that appellant had possessed Government's Exhibit 4, but had done so for his own use rather than for distribution. To the contrary, they could only have

based their acquittal on Count V on a finding of reasonable doubt that appellant Seijo had ever possessed those drugs. Consequently, the Government was collaterally estopped from relitigating that issue at the second trial. Turner v. Arkansas, supra; Ashe v. Swenson, supra; Harris v. Washington, 404 U.S. 55 (19); Sealfon v. United States, 332 U.S. 575 (1961); McDonald v. Wainwright, 493 F.2d 204, (5th Cir. 1974); Green v. United States, 426 F.2d 661 (D.C.Cir. 1970); United States v. Kramer, supra; United States v. DeAngelo, 138 F.2d 466 (3rd Cir. 1943); Wright, Federal Practice and Procedure, §468.

B. The Government was collaterally estopped from relitigating the issue of possession since possession was a lesser included crime of the offense charged in Count V.

Alternatively, even without looking to the record of the first trial to determine whether the judry's acquittal on Count V was based on a finding of reasonable doubt as to possession, the Government was collaterally estopped from relitigating the question of possession at the second trial because possession was a lesser included crime of the offense charged in Count V.

It is established law that after a defendant has been acquitted of a crime, he may not thereafter be retried for a lesser included offense of that crime. Ex Parte Nielsen, 131 U.S. 176 (1889); United States v. Wexler, 79 F.2d 526 (2d Cir.), cert. denied, 29 U.S. 703 (19); Warton's Criminal Law Procedure 1: §148; see also United States v. Cioffi,

487 F.2d 492, 498 (2d Cir. 1973). Since possession of heroin is a lesser included offense of the charge of possession with intent to distribute heroin, it is clear that once appellant Seijo was acquitted on Count V of the indictment, he could not thereafter be retried for mere possession of the drug. Since the acquittal estopped the Government from retrying appellant Seijo for mere possession, it also estopped them from relitigating the issue of possession as proof of the crimes being tried at the second trial. Cf. McDonald v. Wainwright, supra; Green v. United States, supra; United States v. Kramer, supra; United States v. DeAngelo, supra.

When appellant Seijo pleaded not guilty to Count V, he indisputably placed in issue the allegation of that count that he had possessed Government's Exhibit 4. United States v. DeAngelo, supra. The jury's acquittal constitutes a resolution of that allegation in appellant's favor. United States v. DeAngelo, supra,

The fact that mere possession is a lesser included offense distinguishes this case from those cases in which the courts have permitted relitigation of issues because of ambiguity as to the basis for the original jury's verdict. See e.g.,United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974); United States v. Gugliano, 501 F.2d 68 (2d Cir. 1974). In those cases, unlike the present proceeding, the question of fact which the Government sought to relitigate did not

constitute a lesser included offense or even an ultimate fact. Its resolution in the defendant's favor was not essential to a finding of reasonable doubt as to any element of the original charge.

C. Prejudice

The prejudice which appellant Seijo suffered as a result of the relitigation of the issue of possession at the second trial was substantial. The prosecutor himself argued in summation that the question of whether appellant Seijo had possessed Government's Exhibit 4 was "the key to the case" (371). Pursuing this theme, he argued at length that the evidence introduced by the Government* established that appellant Seijo had possessed the drugs. He further argued that since the drugs in Government's

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* As in the first trial, the Government at the second trial sought to prove appellant Seijo's possession of Government Exhibit 4 through the testimony of the arresting officer as to finding the package beneath the seat of the Government car in which Torres and Seijo were seated, and Torres' testimony that he had observed appellant Seijo place such a package in his pants earlier in the evening.

Appellant Seijo's defense to this allegation of possession of Government Exhibit 4 was also virtually identical to his defense on that issue at the first trial. He himself testified that he had never possessed Government's Exhibit 4. Additionally, he introduced the testimony of a former police officer that if appellant Seijo had possessed such a package when he was arrested, it would in all likelihood have been discovered during the frisk which took place before appellant was placed in the Government car.

Exhibit 4 were of the same percentage and cut with the same rare dilutant as the drugs which Torres sold to Scamardello, appellant Seijo's alleged possession of Government's Exhibit 4 established that he knew of and participated in those transactions and consequently was guilty of the crimes for which he was being tried (333-35, 371-72).* Since a previous jury had already found reasonable doubt as to appellant's possession of those drugs, it was error requiring reversal for the Government to relitigate that issue as evidence of the crimes charged in the second trial. Ashe v. Swensen, supra.

II

THE DISTRICT COURT, IN SENTENCING SEIJO TO FIFTEEN YEARS' IMPRISONMENT AND THREE YEARS' SPECIAL PROBATION, ACTED IN VIOLATION OF SENTENCING STANDARDS ESTABLISHED BY THIS COUNT AND IN ABUSE OF IT SENTENCING DISCRETION.

The presentece report in this case established that Seijo had no prior convictions and had had "satisfactory" employment in recent and prior years. The report contained no evidence whatsoever that Seijo had ever been previously involved in narcotics transactions, or that he had financed or supervised the conspiracy in the present proceeding. Yet the sentencing judge at the first trial, indicating

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* The prosecutor's arguments in summation on the issue of possession are set forth in full in the statement of facts in this brief, 17-19, supra.

that he considered Seijo the most culpable of the defendants because the Judge thought Seijo was the "man behind the scenes," or supervisor of the operation, sentenced this first-time offender to fifteen years' imprisonment, the maximum possible sentence under any one count of the indictment (FT 420-22).

At sentencing following the second trial, the Court, while stating that it was aware of its discretion and had examined the question of sentence de novo, repeatedly referred to the original sentence, adopting the sentence justifications of that court (429) and concluding:

> Also, the prior court imposed a sentence on this defendant. The information received at the present time does not how any substantial change in circumstances or give me any basis by which I could reasonably reach a different conclusion.
> (430)

The Court then reimposed the same sentence of fifteen years incarceration and three years special parole (431).

A. Since the sentencing judge did not find that Torres' allegation that Seijo was the "man behind the scenes" in the charged conspiracy had been proven beyond a reasonable doubt, it was error for the Judge to impose sentence on the basis of that allegation.

The jury convicted Seijo of conspiracy (Count I) and possession with intent to distribute and distribution of drugs on June 5 (Count IV). It was not necessary for the jury, in

rendering this verdict, to credit Torres' claim that Seijo was the central figure in the conspiracy.* Moreover, Seijo himself never conceded, either at trial or sentencing, the validity of Torres' claim. To the contrary, he consistently denied that he had played such a role in the crimes charged. However, the Judge at sentencing following the first trial clearly indicated that Torres' totally uncorroborated testimony on this matter was the principal reason for the severity of Seijo's sentence. The Court, at the sentencing following retrial, expressly adopted the first sentencing Judge's sentence justifications and reimposed an identical sentence.

It would indisputably be a violation of due process for a court to sentence a defendant for a more serious crime than the one of which he was actually convicted. A similar due process violation occurs if a judge, even while restricting himself to the maximum sentence permissible under the statute for the crime of which a particular defendant has been convicted, sentences that defendant more severely because he suspects that defendant of a greater culpability than was act-

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* The jury's verdict could have rested solely on their belief that Seijo, by driving Torres' car on June 5, aided and abetted Torres' distribution of drugs on that date (Count IV) and that he did so with a general knowledge of the conspiracy (Count I). The jury may well have found more than a reasonable doubt concerning Torres' claim of Seijo's supervisory role.

ually proven at trial. Consequently, in cases such as this, where an allegation concerning the defendant is not necessary to the jury's determination of guilt, and is not conceded by the defendant, the sentencing court violates due process if it considers that allegation in sentencing without first expressly finding that the allegation was proven beyond a reasonable doubt. This Court recently imposed such a requirement on sentencing judges when the defendant's suspected perjury at trial was being considered:

> ... [W]e hold today that in the future perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it.
>
> (United States v. Hendrix, 505 F.2d 1233, 1236 (2d Cir. 1975)

No rational basis exists for distinguishing between Torres' claim in this case from the perjury being considered in Hendrix. Consequently, this case should be remanded so that the sentencing judge may determine whether the claim was proven beyond a reasonable doubt before using it as the basis for Seijo's sentence.

B. The absence of any substantive standards for the imposition of sentence violated due process and requires vacature of the judgment and remand for resentence in accord with due process.

In United States v. Velazquez, 482 F.2d 139 (2d Cir. 1974), that appellant argued that the absence of substantive standards for the imposition of sentence in the Federal Court violated her right to due process of law, and urged this Court

to adopt the substantive criterion that the sentence imposed be the least restrictive alternative consistent with the goals of punishment. This Court, while noting that

> [t]he present system of sentencing has come under frequent and sometimes telling criticism, e.g., M. Frankel, Sentences: Law Without Order 3-49 (1973); The President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts 23-25 (1967)...
>
> (Id., at 141),

held that the Velazquez case was not an appropriate vehicle for considering the imposition of such a criterion since

> the sentence imposed on appellant was substantially less than the statutory maximum.... [T]he appellant did not request from Judge Tenney either an explanation of his reasons for imposing the 18 month sentence or disclosure of the pre-sentence report.
>
> (Id., at 141-142).

In the present proceeding, all three of these preconditions are met. After adopting the first sentencing judge's conclusion that Seijo was the "man behind the scenes," the Court imposed on this first-time offender a sentence of fifteen years' imprisonment, the maximum allowable under any one count. The presentence report contained no information which could justify such a severe sentence. In light of the unjustifiably severe sentence imposed, this Court should now examine the pressing need for its recognition of the "least restrictive alternative" criterion in sentencing, and the due

process violation which arises in the absence of such a standard.

The sentencing process in the Federal courts has been subjected to increasing criticism from jurists and legal scholars because of the virtual absence* of substantive standards to guide the sentencing judge. As Judge Frankel recently noted, when the action of a judge in imposing sentences is limited by nothing other than a statutory maximum term, it is arbitrary and irrational:

> The statutes granting such powers characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place in between. It might be supposed ... that the criteria for measuring a particular sentence would be discoverable outside the narrow limits of the statute and would be known to the judicial experts rendering the judgments. But the supposition would lack substantial foundation.
>
> Lawlessness in Sentencing, 41 U. of Cincinnati L. Rev. 1, 4 (1972).

What is more, the absence of substantive standards encourages irrational, arbitrary, and secretive sentences. The problem was stated succinctly by Mr. Justice Stewart when, as a Circuit Judge, he wrote:

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*The only meaningful substantive standard is the "individualization" rule of Williams v. New York, 337 U.S. 241 (1949), which held that the sentencing judge must consider the defendant's life and characteristics, and that the penalty must fit the offender as well as the crime.

> Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives.... It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this important dimension of fundamental justice.
>
> Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).*

The unfettered and unguided power of the American trial judge is unique in the world,** and serious abuse of such incredible discretion is inevitable. Judge Sobeloff, of the Fourth Circuit Court of Appeals, has said:

> It is [at sentencing] that the whole intricate network of protections and safeguards which were [the defendant's] at the trial vanishes and gives way to the widest latitude of judicial discretion. What happens at this juncture depends largely on the judge's conscience or, as some have suggested, the state of his digestion.
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> Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Circuit Court of Appeals for the Second Circuit, 32 F.R.D. 249, 265 (1962).

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*Fairness in sentencing is especially important when it is recognized that seventy to ninety percent of defendants plead guilty in all jurisdictions. American Bar Association Project on Minimum Standards for Criminal Justice, Appellate Review of Sentences at 1 (Approved Draft, 1968).

**Goldfarb and Singer, After Conviction at 190-91 (1973); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 25 (1967).

That the irrational, arbitrary, and secretive power of sentencing judges leads to disparate sentences in this Circuit is affirmed by a study of the United States Attorney for the Southern District of New York, which concludes that

> [t]he chances of a defendant going to jail are still largely determined by which judge his case is assigned to.... Permitting these differences in personal opinion to control sentencing largely destroys the ideal of evenhanded justice for the individual defendant.
>
> Sentencing Study, at 8 (1972).*

Also, the irrational atmosphere which results in wildly unpredictable sentences gives the courts an atmosphere of injustice and results in making rehabilitation more difficult.**

The virtual absence of substantive standards in sentencing is inexplicable, since sentencing is an inseparable and critical part of the criminal process, Brady v. United States, 41 U.S.L.W. 4368 (Sup.Ct., March 5, 1973), which is otherwise structured with articulate principles and safeguards, and there is no doubt that due process principles are applicable to the sentencing process as well. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Tucker, 404 U.S. 443 (1972). The result of the absence of standards is unfairly and excessively to sub-

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*Examples of sentencing disparity are set forth in the same Study at 12-14. The study covers the period from May 1, 1972 to November 30, 1972.

**Irrational sentences are a primary source of prisoners' complaints. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society at 141-45 (1967); Frankel, Lawlessness in Sentencing, supra, 41 U. of Cincinnati L. Rev. at 12.

scribe liberty -- the fundamental right guaranteed by the Constitution. Significantly, American judges, operating in a substantive and procedural void, hand down the longest prison sentences in the Western world.*

That a primary function of the due process clause is to protect liberty against arbitrary limitation by governmental power has often been decided by the Supreme Court. For example, in Slocher v. Board of Higher Education of New York City, 350 U.S. 551 (1956), the Court struck down a provision of the New York City charter which mandated the automatic firing of a college professor who refused to answer questions before a Congressional committee. Mr. Justice Clark, writing for the majority, noted that the protection of the individual against arbitrary action was "the very essence of due process," 350 U.S. at 559. Similarly, Mr. Justice Fortas, in In re Gault, 387 U.S. 1 (1967), wrote, while deciding that juvenile court proceedings arbitrarily deprived minors of fundamental rights:

> Due process is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise.
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> Id., 387 U.S. at 20.

In Nebbia v. New York, 291 U.S. 502, 528 (1934), the Court clearly stated the principle:

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*Frankel, An Opinion by One of Those Softheaded Judges, The New York Times Magazine, May 13, 1973, at 41.

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, did not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.
>
> Id., at 525.

And in Jones v. Securities Commission, 298 U.S. 1, 23-24 (1936), the Court was eloquent. Speaking of the Commission's refusal to permit the withdrawal of a registration statement, the Court said:

> The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest -- that this shall be a government of laws --, because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy....
>
> Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day -- "there is no place in our constitutional system for the exercise of arbitrary power."

See also, e.g., Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966); Barsky v. Board of Regents, 347 U.S. 442, 459,

462-63 (1954) (dissenting opinion of Mr. Justice Black); Malinski v. New York, 324 U.S. 401, 417 (1945) (opinion of Mr. Justice Frankfurter).

Thus, at a minimum, the protections afforded by due process require that limitations on the liberty of an individual, like limitations on other fundamental rights, must be insulated from irrational and arbitrary deprivation.

Appellant urges that this Court adopt standards of substantive law to guide district judges in ascertaining the constitutional limitations on the deprivation of a convicted defendant's liberty.* The appropriate criterion for for the deprivation of liberty is that the penalty be the least restrictive alternative consistent with the goals of of punishment.** The application of this constitutional

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*There is no limitation on the Court's power to establish due process standards. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972); In Re Gault, 387 U.S. 1 (1967).

**See, for example, the Statement of Purpose and Policy of the National Counsel on Crime and Delinquency, Model Sentencing Act, §1 (1972 revision):

> The purpose of penal codes and sentencing is public protection. Sentences should not be based upon revenge and retribution. The policy of this Act is that dangerous offenders shall be identified, segregated and correctively treated in custody for long terms as needed, and that other offenders may be committed for a limited period. Nondangerous offenders shall be dealt with by probation, suspended sentences, or fine wherever it appears that such disposition does not pose a danger of serious harm to public safety.
>
> Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances, and needs.

principle to sentencing requires that whatever the goal of punishment in the individual case -- retribution, deterrence, rehabilitation, or isolation -- the sentence should involve the least serious punishment to accomplish the end.

The least restrictive alternative standard is applicable to sentencing because it is the traditional due process test for governmental limitation on fundamental constitutional rights. In Shelton v. Tucker, 364 U.S. 479 (1960), the Court, in striking down an Arkansas law that required all teachers to file annual affidavits listing membership in every organization to which the teacher belonged, noted:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Similarly, in Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Court, in striking down a provision that limited the right to travel of members of the Communist Party, ruled that "Congress ha[d] within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security." Id., 378 U.S. at 512-13. The Shelton least restrictive alternative theory, has been applied to innumerable fundamental liberties, including recently the right to peaceful picketing near schools (Police Department of Chicago v. Mosley, 408 U.S. 92, 101 (1972)), and the right to vote without unreasonable resi-

dence durational requirements (Dunn v. Blumstein, 405 U.S. 330, 343 (1972)). The principle has even been applied to prohibit excessive limitations on the rights of pretrial detainees (Brenneman v. Madigan, 343 F.Supp. 128, 138 (N.D.Cal. 1972)), and to protect the rights of patients civilly committed to mental hospitals (Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969)).

The view that proper punishment involves the least possible imprisonment is compelled by the need to protect liberty of the individual from the arbitrary and capricious limitations imposed by the present sentencing system. Recently, Mr. Justice Brennen wrote, while concurring in Furman v. Georgia, 408 U.S. 238 (1972):*

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.
>
> Id., 408 U.S. at 279.

This principle, that a severe punishment "serves no penal purpose more effectively than a less severe punishment," id., 408 U.S. at 280, was recognized by the Court in

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*Furman concerned a challenge to capital punishment based on the cruel and unusual punishment clause.

Weems v. United States, 217 U.S. 349, 381 (1910),* and is implicit in Mr. Justice Douglas' concurrence in Robinson v. California, 370 U.S. 660 (1962), when he wrote that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" Id., 370 U.S. at 676.**

The least restrictive alternative theory of punishment has been urged by the current and extensive studies of sentencing and sentencing problems, including the National Council on Crime and Delinquency, supra, the American Law Institute Model Penal Code,*** and the American Bar Association which suggests:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

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*Weems concerned a challenge to a lengthy prison sentence based upon an unfair law governing the Philippines. The challenge was based upon cruel and unusual punishment.

**In Robinson, the Court struck down addiction as a "status" crime.

***American Law Institute, Model Penal Code - Sentence Provisions, §7.01(1) (1967), provides:

> The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public.

American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, §2.2 at 14 (Approved draft, 1968).

This case should therefore be remanded for resentencing with instructions that the sentencing judge impose the least restrictive sentencing alternative appropriate for this first-time offender.

CONCLUSION

For the above-stated reasons, appellant Seijo's conviction and/or sentence should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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I hereby certify
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M. J. Nichols